SUPREME COURT OF APPEALS OF VIRGINIA.

COMMANDER *v.* PROVIDENT RELIEF ASS'N.

Jan. 22, 1920.

[102 S. E. 89.]

1. Appeal and Error (§ 1175 (8)*)—On Determination That Setting Aside Verdict Was Error, Appellate Court Will Render Judgment on Verdict.—Under Code 1904, § 3484, appellate court, in reviewing judgment upon retrial of case, after verdict on first trial was set aside by trial court, will first look to the evidence and proceedings upon the first trial, and, upon discovery that court erred in setting aside first verdict, must annul all proceedings subsequent thereto, and enter judgment thereon.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 578.]

2. Appeal and Error (§ 997 (3)*)—Appellate Court Will Not Pass on Conflicts in Evidence.—Appellate court will not pass upon conflicts in the evidence on review of directed verdict.

3. Malicious Prosecution (§ 71 (1)*)—Malice and Want of Probable Cause Questions for Jury.—Malice and want of probable cause in actions for malicious prosecution are usually questions for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 501, 502.]

4. Malicious Prosecution (§ 21 (2)*)—Advice of Counsel on Full Disclosure Complete Defense.—The advice of counsel, sought with an honest purpose of being informed as to the law, and procured upon a full, correct, and honest disclosure of all material facts within the knowledge of the party seeking such advice, or which should have been within his knowledge, if he had made a reasonable, careful investigation, constitutes a complete defense to an action for malicious prosecution.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 503.]

5. Malicious Prosecution (§ 56*)—Burden of Proving Advice of Counsel upon Defendant.—In an action for malicious prosecution, defendant has burden of proving that advice of counsel was sought and obtained with the honest purpose of being informed as to the law, and upon a full, correct, and honest disclosure of all material facts within his knowledge.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 503.]

6. Malicious Prosecution (§ 71 (4)*)—Advice of Counsel Question for Jury.—In an action for malicious prosecution, question of whether advice of counsel was sought with an honest purpose of being informed as to the law, and was obtained upon a full, correct, and honest disclosure of all material facts, is for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 503.]

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

7. Malicious Prosecution (§ 23*)—Want of Probable Cause Not Inferred from Malice.—Want of probable cause cannot be inferred from malice.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 502.]

8. Malicious Prosecution (§ 21 (2)*)—Requirements as to Disclosure of Facts to Counsel Stated.—Disclosure of facts required in order that advice based thereon may constitute a defense, in suit for malicious prosecution, must not only cover all the relevant facts within the knowledge of the prosecutor, but must include also material facts which would have been within his knowledge, if he had made a reasonable, careful investigation as to the guilt of the party accused.

[Ed. Note.—For other cases, see 14 Va.-W. Va. Enc. Dig. 672.]

9. Malicious Prosecution (§ 72 (3)*)—Instruction on Advice of Counsel Proper under Evidence.—In suit for malicious prosecution, instruction that advice of counsel was no defense, if defendant had not made a full, correct, and honest disclosure of facts to counsel, but had instituted criminal prosecution from a fixed determination of his own rather than the opinion of counsel, held proper under the evidence.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 503.]

10. Malicious Prosecution (§ 64 (1)*)—Verdict for Plaintiff Warranted by Evidence.—In suit for malicious prosecution, evidence held to warrant a verdict for plaintiff.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 503.]

Error to Circuit Court of City of Norfolk.

Action by J. M. Commander against the Provident Relief Association. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

J. E. Cole and *Fred. C. Abbott,* both of Norfolk, for plaintiff in error.

S. L. Kelly, of Richmond, and *John J. Blake,* of Norfolk, for defendant in error.

KELLY, P. On the 14th day of October, 1914, the Provident Relief Association procured a warrant for the arrest of J. M. Commander, charging him with the larceny of $72.96. He was arrested, imprisoned until he could obtain bail, and was subsequently in due course indicted, tried, and acquitted in the corporation court of the city of Norfolk. Thereupon he brought an action against the Provident Relief Association, charging it with having instigated his arrest and prosecution maliciously and without probable cause.

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

This action was tried, and the jury rendered a verdict in favor of Commander for the sum of $3,500, which the trial court set aside as being contrary to the law and the evidence. The plaintiff by bill of exceptions preserved the record and proceedings on that trial. Subsequently the case was again tried and the jury, upon a peremptory instruction from the court, rendered a verdict for the defendant. The plaintiff brings the case here for review.

[1] Under the familiar statutory rule of practice we must look first to the evidence and proceedings upon the first trial, and if we discover that the court erred in setting aside the first verdict, we must annul all proceedings subsequent thereto and enter judgment thereon. Code 1904, § 3484.

The evidence was conflicting, but in support of the verdict it tended materially to establish the following facts: The Provident Relief Association was an industrial insurance company, and Commander had been in its employment for about 14 years. Within a few months after entering the service of that company he was made superintendent of its Norfolk district. The business prospered under his management, and increased largely in volume. He handled in the aggregate large sums of money, which were paid to him every week by the solicitors working under him. With the knowledge and acquiescence of the executive officers he had always kept these funds in his own name in a Norfolk bank, making weekly remittances to the home office in Washington, D. C., and the charge involved in this case was the only one of a criminal nature or semblance ever made against him.

Among the solicitors or collectors in Commander's district was a man named R. B. Cornick. In February, 1911, this man appeared to be delinquent in his accounts. About that time the president of the company was in Norfolk to attend a sort of booster meeting for the encouragement and stimulation of the local collectors. Cornick's accounts were audited, his deficiency disclosed, and the president, according to Commander's testimony, relieved him thereof, charged it off, and gave him a "clean sheet." The evidence on behalf of the company contradicts this latter statement of Commander, but shows that deficiencies of this kind were sometimes remitted, and the verdict of the jury settled the conflict in favor of his version.

Cornick remained with the company until June, 1911, when he was again in default, and Commander told him that he could not work for the company longer. Cornick thereupon began to work with a similar and rival insurance company. Commander reported these conditions to his own company, and after consultation with the president, and upon the latter's instructions

and advice, the matter was brought to the attention of the commissioner of insurance by the following letter addressed to Col Joseph Button, commissioner, at Richmond:

"Dear Sir: I hereby apply to have the license of R. B. Cornick revoked and charge that from his own account taken from his collecting book he was short in his account to the extent of $93.00; that he afterwards showed me between $3.00 and $4.00 additional. He claims an offset of about $10.00 on excess arrears.

"[Signed] J. M. Commander,
"Supt., Norfolk,
"For the Provident Relief Association of
"Washington, D. C."

By direction of the president, a Richmond lawyer of known standing and ability was employed by Commander to appear befor the insurance commissioner on behalf of the company. During the investigation, it developed that Cornick owed Commander, according to the latter's statement, on individual account, certain sums which he had from time to time advanced on Cornick's account in settlements with the company. Commander was making no point of his alleged indebtedness to him before the commissioner, but the latter decided that he would not permit a renewal of Cornick's license unless he settled with Commander for the advances above mentioned, as well as for the deficiency appearing on the books of the company. The amount which Commander agreed to accept in full for the company was $90, being a few dollars short of the actual amount due; and the individual indebtedness claimed by Commander for advances on his account was $72.96. Cornick paid both amounts, and Commander gave him a receipt in the following form:

"July 21, 1911,

"Received of R. B. Cornick the sum of $162.96 in full settlement of his shortage to the Provident Relief Association, and in full settlement of his personal indebtedness to J. M. Commander. [Signed] J. M. Commander,
"Supt. Provident Relief Association.

"This settlement is entirely satisfactory to me.
"[Signed] J. M. Commander, Supt."

The foregoing receipt in the form as herein set out appears to have been given and submitted to the insurance commissioner to satisfy him that Cornick had complied with the commissioner's requirements.

In September, 1911, Commander was in Washington at the

home office of the company in connection with another matter, but in the course of the conversation there he went over Cornick's affairs with the vice-president, and fully explained to him all about the settlement which he had made with Cornick, including the details of the hearing before the insurance commissioner.

Commander remained with the company for about 3 years longer. In the summer of 1914, some friction developed between him and the general officers of the company in Washington, and he was finally discharged in October, 1914, under circumstances indicating a very decided ill temper on the part of the president and vice-president of the company. Up to about the month of August, 1914, there seems never to have been any trouble between Commander and the company, but about that time the executive officers decided to make some changes in the affairs of the company, and incidentally desired to reduce the salary of Commander, not because of any alleged inefficiency on his part, but presumably to save money for the company. There is reason to infer that these officers invited trouble with Commander, and sought for some grounds upon which to either reduce his pay or get rid of him; and there was also evidence to the effect that the defendant wished to discredit him for fear he might, after his discharge, enter the service of some competing company, and divert to it some of the defendant's business, and that the vice-president said to him in that regard, "Well, we will see that you don't do business any way," or words to that effect.

At the time of his discharge he had a substantial amount of money in his hands belonging to the company, and claimed that the company owed him a considerable sum which should be credited upon that amount. In the settlement of this matter, he was represented by Baker & Eggleston, a law firm in Norfolk, and the company was represented by Jeffries & Jeffries of that city. At no time from June, 1911, to the time of his arrest did the representatives of the company ever intimate to him that they thought he had taken money belonging to it. When the proposed settlement of accounts had reached the point for an exchange of receipts, the company demanded a receipt in full from him, but declined to give to him a like receipt. He and his attorneys insisted upon an explanation for this attitude on the part of the company, but none was forthcoming. It developed afterwards that shortly before Commander's discharge, the vice-president of the company had interviewed Cornick, and had been informed by him that the receipt given by Commander in connection with the investigation before the insurance commissioner represented exclusively money which was due to the company, and that he did not owe Commander anything individually.

Subsequently Cornick gave the following affidavit, after an interview with the attorneys of the insurance company, to wit:

"This day personally appeared before me, the undersigned, a notary public in and for the city of Norfolk, state of Virginia, R. B. Cornick, who made oath that on the 21st day of July, 1911, he paid to J. M. Commander, agent for the Provident Relief Association, the sum of one hundred and sixty-two dollars and ninety-six cents ($162.96) in full settlement of his indebtedness to the Provident Relief Association. In the receipt which was given there is added these words, 'and in full settlement of his personal indebtedness to J. M. Commander.' Affiant here states that he was not indebted personally to J. M. Commander, and that the whole sum of one hundred and sixty-two dollars and ninety-six cents (162.96) was the balance due to him to the Provident Relief Association."

The conclusion which the company attempted to draw from this affidavit, and which Cornick's testimony as a witness in this case supports, is that the $72.96 collected from Cornick by Commander on individual account represented the February, 1911, deficiency with which Cornick was charged on the books at the home office. Commander denies this, and insists that the February, 1911, deficiency had been remitted, and that the $72.96 represented an aggregate of smaller sums, which from time to time he had advanced for Cornick to enable him to settle his weekly accounts. Cornick's statement is at variance with the receipt which he signed, and this variance is not satistactorily explained by him. The circumstances strongly corroborate Commander, and his version of the matter is entirely consistent with what the attorney who represented the company before the commissioner says Commander stated at that time as to Cornick's personal indebtedness to him.

Commander had not heard of the above-mentioned affidavit, nor was the matter of his alleged larceny three years prior thereto mentioned to him in any way, until after his arrest. He made an explanation, substantially as above shown, which was satisfactory to the jury, both in the criminal prosecution and in the trial of the instant case, and it is not too much to say that the jury in the latter case had the right to believe from the evidence that if the officers of the insurance company had been acting in perfect good faith, and with an honest desire to get at the true facts about his guilt or innocence, they would have sought his explanation, or at least given him an opportunity to explain before bringing about his arrest.

[2, 3] There was much testimony on the part of the defendant to controvert or explain the damaging features of the plaintiff's testimony as above set out. There was however to say the

least of it, sufficient support for the plaintiff's version, and we are not to pass upon the conflicts in the evidence. Malice and want of probable cause in actions for malicious prosecution are usually questions for the jury, and in this case there was evidence upon which the jury might have found the existence of both of these essential elements to the right of recovery. The instructions of the court set out with entire fairness to defendant the propositions of law involved in the case, and the only question before us is whether the court erred in setting aside the verdict as contrary to the evidence.

Enough has been said to show that the verdict ought not to have been disturbed for lack of evidence on the part of the plaintiff to sustain it. It only remains to consider whether the action of the trial court was warranted by the defendant's claim that in bringing about the arrest and prosecution of the plaintiff it acted upon the advice of counsel. This is the ground upon which the court gave a peremptory instruction for defendant on the second trial, and is doubtless the one upon which the verdict on the first trial was set aside. It is also, as we understand counsel, the point chiefly relied upon for an affirmance of the judgment under review.

[4, 6] It may be considered settled that advice of counsel, sought with an honest purpose of being informed as to the law, and procured upon a full, correct, and honest disclosure of all material facts within the knowledge of the party seeking such advice, or which should have been within his knowledge if he had made a reasonably careful investigation, constitutes a complete defense to an action for malicious prosecution; but the burden is on the defendant to prove that such advice was sought and obtained with the purpose and upon the disclosures here described, and whether such advice was thus sought and obtained is usually a question for the jury. 1 Cooley on Torts (3d Ed.) p. 333; Burk's Pl. & Pr. p. 237; Evans *v.* Atlantic Coast Line Ry. Co., 105 Va. 72, 76, 80, 53 S. E. 3.

The senior member of the firm of Jeffries & Jeffries was principally in charge of the criminal branch of the litigation between Commander and the company. He and the officers of the company undertook to testify that there was a full disclosure to him of all the facts and circumstances in connection with the alleged larceny; that he laid the same before the commonwealth's attorney, and that thereupon both he and the commonwealth's attorney advised the company that the case was one for prosecution.

[7, 8] Notwithstanding this positive testimony, however, the facts of the case bring it within the general rule that the defense based on advice of counsel is one which should be passed upon

by the jury. There were circumstances tending materially to show, not only a lack of good faith and honest purpose on the part of the company in seeking and acting upon the advice of counsel, but also to show failure to make the requisite disclosure. Want of probable cause cannot be inferred from malice, but the ill will of the officials of the company, coupled with their desire and threat to disarm the plaintiff as a competitor, are circumstances which the jury had the right to consider in determining whether the advice of counsel was sought in good faith and with an honest purpose to be informed as to the law, or merely as a sham and subterfuge, and as a part of a general scheme of severing his connection with the company in such a way as that he would not be able to take with him to some rival company any of the business which he had built up. Aside from this, however, the jury might well have found that the disclosure made to counsel did not measure up to the requirements of the law. There is a conflict of authority upon the question, but the rule in Virginia is that the disclosure required in order that the advice based upon it may constitute a shield against a suit for malicious prosecution must not only cover all the relevant facts within the knowledge of the prosecutor, but must include also material facts which would have been within his knowledge if he had made a reasonably careful investigation as to the guilt of the party accused. Burk's Pl. & Pr. p. 237; Evans *v.* A. C. L. Ry. Co., 105 Va. 72, 80, 53 S. E. 3.

It does not appear that the officers of the company inquired of the attorney who represented them before the insurance commissioner, nor of the commissioner himself, as to the statements at that time made by Commander. The jury thought, and we think, and perhaps counsel would have thought, that Commander's explanation of what took place before the commissioner was probably true. It is difficult to see how counsel of the learning and ability of the gentlemen who are said to have advised the criminal prosecution could have given such advice with full knowledge of the facts disclosed in the record before us, and yet there appears no reason why the company could not, at any time after September, 1911, have ascertained all the facts both for and against Commander's view of the case as fully as they were developed upon the trial.

Furthermore, the jury might very well have thought that some of the statements which the executive officers made to counsel were not true. For example, they told their counsel that Cornick owned a February, 1911, deficiency, and yet Commander testified positively that this deficiency had been remitted and charged off, thus no longer constituting an indebtednesss against Cornick. This was one of the important facts in the

case and, if Commander is right, then the vice-president of the company, now, the president, did not tell the truth to his counsel about this fact, nor to the jury on the stand. The jury accepted Commander's statement and rejected the conflicting testimony, and we must do the same. In reaching this conclusion the jury was doubtless influenced by the further fact that Cornick had been taken back into the employment of the company, and had been with the company for some time before Commander was discharged, and neither Commander nor the representatives of the company at the home office had ever asked Cornick to account for the alleged February, 1911, deficiency. The jury may have been further influenced by the testimony of the commonwealth's attorney, who said that, although he advised the prosecution, he did so without having been told anything about the investigation before the insurance commissioner, and that he would have at least hesitated if he had known that the receipt given by Commander had been executed as a result of a hearing before the commissioner, and with the knowledge of counsel representing the company. Finally, and by no means least important, it appears in the evidence that the junior member of the firm of Jeffries & Jeffries, after the arrest of Commander, made the following statement to Mr. Eggleston, who had been counsel for Commander in the above-mentioned settlement of accounts, but who was not counsel in the criminal prosecution, to wit:

"We told those people that if they went after him [Commander] they were liable to get soaked, but they did it anyhow."

This testimony of Mr. Eggleston, after some controversy, finally went to the jury without objection. It is true that young Mr. Jeffries denied having made this statement, but admitted that he had a jocular conversation with Mr. Eggleston which the latter had misinterpreted, and in which he claimed to have simply said that he was not surprised at the suit, or something to that effect. The testimony of Mr. Eggleston, however, is direct and positive, and it was for the jury to decide what the conversation was and what it meant.

It has been urged upon us in the oral argument and in the brief that Mr. John L. Jeffries, the late lamented senior member of the firm of Jeffries & Jeffries, was an upright and distinguished lawyer, and a gentleman of veracity and integrity. This insistence is in accord with the view which the members of this court entertain of the character of Mr. Jeffries. This, however, does not take the case out of the general rule. He and his partner testified in the case, and therefore fall within the ordinary category of witnesses.

The law upon this branch of the case was stated to the jury

by an instruction, which was certainly fair to the defendant, because it omitted any reference to such facts as the defendant might, upon reasonable inquiry, have ascertained, and which was not in conflict with the other and ample instructions of the court. The instruction referred to was as follows:

"The court instructs the jury that the burden of proof is upon the defendant to prove that he sought counsel with an honest purpose to be informed as to the law, and that he was in good faith guided by such advice in causing the arrest of the plaintiff, and that whether or not the defendant did, before instituting the criminal proceeding, make a full, correct, and honest disclosure to his attorney or attorneys of all the material facts bearing upon the guilt of the plaintiff, of which he had knowledge, and whether, in commencing such proceedings, the defendant was acting in good faith, upon the advice of his counsel, are questions of fact to be determined by the jury, from all the evidence and circumstances proved in the case. And if the jury believe from the evidence that the defendant did not make a full, correct, and honest disclosure of all such facts to his counsel, but that he instituted criminal prosecution from a fixed determination of his own, rather than the opinion of counsel, then such advice can avail nothing in this suit."

[9, 10] The evidence in the case made it proper for the foregoing instruction to be given, and we think the verdict of the jury ought not to have been interfered with.

For the reason stated, we are of opinion that the court erred in setting aside the verdict on the first trial, and we shall proceed, pursuant to the provisions of the statute, to enter an order in this court, annulling all subsequent proceedings and entering up a judgment in favor of the plaintiff for the amount of the damages fixed by the verdict of the jury.

Reversed.

Note.

Malicious Prosecution—Defense of "Advice of Counsel"—Requirements as to Disclosure of Facts to Counsel.—A full and fair statement of material facts to counsel is indispensable when his advice is to be interposed as a shield to a recovery in an action for malicious prosecution. On this rule of law all the courts are in accord. It is in determining what constitutes a "full and fair" disclosure of facts that brings about a diversity of opinions among the courts. The serious conflict is whether a defendant will be deprived of his defense of advice of counsel by reason of want of diligence in not ascertaining all the facts.

The rule in Virginia followed in the instant case is found in Evans *v.* Atlantic Coast Line Ry., 105 Va. 72, 53 S. E. 3, where it was held that a defendant who instigated the prosecution and did not make to counsel a disclosure of material facts which he should have known after a reasonably careful investigation bearing on plaintiff's guilt,

would be deprived of the defense of advice of counsel. There are no other Virginia cases on this subject and it is to be noted that this case was decided by a divided court, Buchanan, J., dissenting.

In Wyatt *v.* Burdett (Colo.), 95 Pac. 336, where the defense to an action of malicious prosecution was based upon advice of counsel, it was held that since the defendant failed to make such a reasonable investigation as would have informed him of the actual facts, such defense would thereby fail.

Kentucky Courts are in accord with this rule. "The disclosure is not full and fair, unless it (defendant) laid before counsel all the facts bearing on the question which it knew or could have ascertained by reasonable inquiry." Anderson *v.* Columbia Finance & Trust Co., 20 Ky. L. Rep. 1790, 50 S. W. 40; Ahrens & Ott Mfg. Co. *v.* Hohen, 106 Ky. 692, 51 S. W. 194.

The Kansas Court seems to carry the doctrine further and requires more of the defendant than any other court. In Atchison, T. & S. F. R. Co. *v.* Brown, 57 Kan. 785, 48 Pac. 31, where the trial court failed to submit to the jury the question whether the defendant had laid before counsel all the facts which could have been learned by *diligent* investigation, it was held that error had been committed. The court said: "All the facts must be laid before such counsel, not only all which are known to the informant, but all which can be learned by a *diligent* and *faithful* effort to acquire pertinent information." (Italics ours.)

The holdings in many other jurisdictions are in accord with the doctrine of the instant case. Steed *v.* Knowles, 79 Ala. 446; Motes *v.* Bates, 80 Ala. 382; National Surety Co. *v.* Mabry, 139 Ala. 217, 35 So. 698; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Clonts *v.* Baldwin, 25 Kan. 120; Kirk *v.* Wiener-Loeb Laundry Co., 120 La. 820, 45 So. 738; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Carp *v.* Queen Ins. Co., 203 Mo. 295, 101 S. W. 78; Butcher *v.* Hoffman, 99 Mo. App. 239, 73 S. W. 266; Denis *v.* Shoultz, 25 Ont. App. Rep. 131.

In conflict with the rule as laid down by the above courts, in several jurisdictions, it is held that the defense of advice of counsel is available in an action for malicious prosecution, to one who discloses to counsel all the facts within his knowledge, although he did not disclose all the material facts bearing on the case, which he could have ascertained by reasonable diligence. Vinal *v.* Cave, 18 W. Va. 1, 72; Dunlap *v.* New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 Pac. 29; Holliday *v.* Holliday (Cal.), 53 Pac. 42, reaffirmed in 123 Cal. 26, 55 Pac. 703; Missouri, K. & T. Ry. Co. *v.* Groseclose, 50 Tex. Civ. App. 525, 110 S. W. 477; King *v.* Apple River Power Co., 131 Wis. 575, 111 N. W. 668, 18 L. R. A., N. S., 575; Johnson *v.* Miller, 69 Ia. 562, 58 Am. Rep. 231; Gillispie *v.* Stafford, 4 Neb. 873, 96 N. W. 1039; Putnam *v.* Stalker (Or.), 91 Pac. 363; Hess *v.* Oregon German Banking Co., 31 Or. 503, 49 Pac. 80?

Although it is conceded that the weight of authority is in favor of the rule as laid down by the court in the instant case yet it is submitted that the doctrine based on more reason and principle as adopted by other courts of high standing is that, where advice of counsel is honestly sought, and the facts fairly and in good faith submitted to competent counsel, his advice ought to be a protection to the party, and proof sufficient that he had probable cause to institute the prosecution. It is urged against this rule that by its enforcement one commencing a criminal prosecution with most malicious motives and entire want of probable cause might shield himself behind the advice of an unscrupulous or incompetent attorney.

But to this contention it may be replied that dishonest parties often take advantage of the most beneficent legal rules in an attempt to escape punishment or damage on account of their wrongdoing, and the fact that injustice may occasionally arise because of a rule of law founded on reason and public policy ought not to operate in its disfavor.

Another argument against this rule is that one who consults an attorney about a matter affecting a third person ought to use that care which men of ordinary prudence use in matters of like magnitude. But what is "ordinary prudence" in cases of this kind? He ought not to be required to exhaust all sources of information bearing upon the facts which have come to his knowledge, for that would be to require him to perform the office of the Committing Magistrate, and thus thwart the very purposes of the law in inducing him to seek its immediate vindication for crimes committed against it.

It may be that the facts within the defendant's knowledge are such as to put him upon inquiry with reference to other facts by which he would be chargeable with a knowledge of all that such inquiry would have shown, or it may be that his own relation to the facts brought to his knowledge would make him presumptively cognizant of other facts. These circumstances, however, would bear upon his good faith in making the statement in that particular case, rather than establish the rule that he must in all cases exercise any diligence or effort for the purpose of ascertaining whether there are other facts than those which have come to his knowledge, and fall within the rule requiring him to state, without any suppression, all the facts actually or presumptively within his knowledge.

A decision upon this subject in favor of the rule contended for, and which is approved by Judge Burke in his "Pleading and Practice," p. 238 and by the learned Annotator in 26 Am. St. Rep. 147, is expressed by the Supreme Court of Iowa in Johnson *v.* Miller, supra. The court said: "One who seeks the advice of counsel with reference to the commencement of a criminal prosecution is bound to act in good faith in the matter. Unless he does this, he will not be protected from liability on the ground that he acted upon the advice given him. He is required to make to counsel a full and fair statement of all the material facts known to him. If he has a reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected."

R. C. Smith